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NEW HAVEN LEGAL ASSISTANCE ASSOCIATION, INC.

426 STATE STREET
NEW HAVEN, CONNECTICUT 06510-2018
TELEPHONE: (203) 946-4811
FAX (203) 498-9271

February 24, 2009

**Testimony of Sheldon Toubman before the Human Services Committee
In Opposition to SB 956, Which Would Undercut HUSKY HMO Accountability,
and in Support of SB 957**

Good Morning, Senator Doyle, Representative Walker and Members of the Human Services Committee. My name is Sheldon Toubman and I am a staff attorney with New Haven Legal Assistance Association, concentrating on access to health care issues. I am here today to speak in opposition to S.B. 956, which would severely undercut the successful effort to bring accountability to the huge state contracts totalling over \$600 million/year under the HUSKY program. I am also here in support of S.B. 957.

Opposition to S.B. 956

I am one of the attorneys who has been involved in the effort over many years to hold the HUSKY HMOs accountable to the taxpayers who pay them and to the low-income HUSKY recipients they have contracted with the state to serve. This accountability has been necessary because of the persistence of severe access problems under these plans, coupled with the perennial unwillingness of these companies to share basic information necessary to assess their performance under their state contracts.

The Freedom of Information Commission (FOIC), in December of 2006 and April of 2007, found that these state contractors, because they take over DSS's role in managing Medicaid benefits for the family and child Medicaid population, are performing a "governmental function" under the Freedom of Information Act (FOIA), Conn. Gen. Stat. §§ 1-200(11) and 1-218, and thus that all documents related to their performance under their state contracts are subject to public disclosure under FOIA. As a result of these rulings, and the general clamor for more accountability from these large state contractors, the Governor and the Department of Social Services are now firmly committed to the FOIA obligation as a condition of any HMO contracts under HUSKY.

Thus, there are now in place three signed contracts between DSS and HMOs in which each of the HMOs, two of which are for-profit companies, firmly commits to be bound by the FOIA. In fact, the Governor has demanded compliance with that obligation even when HUSKY contractors act as non-capitated administrative services organizations. While two HMOs departed the HUSKY program in April 2008, two others, including Anthem Health Plans, accepted the FOIA obligation and signed contract amendments agreeing to be bound by this basic accountability obligation as such non-risk contractors. There is no need for any legislation regarding this issue.

But S. 956 is not simply unnecessary. Worse, it would limit Medicaid HMOs to having to disclose only a very restricted set of governmental function documents, giving them a privileged status compared to all other state contractors performing this kind of function for over \$2.5 million/year, and rendering the FOIA disclosure obligation close to meaningless. It would also serve a bad precedent that other large state contractors would seek to exploit to obtain the same protection from public accountability.

Under the FOIC rulings now adopted as the DSS position in signed contracts with the three HMOs, **all** of the HMOs' documents related to the performance of their state contracts are subject to public disclosure, though the HMOs have the right to claim to DSS that some documents should remain confidential under specified statutory exemptions under the FOIA, with DSS serving as the ultimate arbiter.

S. B. 956 would effectively undo these important contractual provisions by very narrowly limiting the kinds of documents that HUSKY HMOs would have to produce. It would:

- Limit the documents subject to disclosure to those specifically "***created for the purpose*** of performing a governmental function". This weakens the current law and contract language which extends to all documents "related to" a governmental function regardless of the purpose for which the document was created. Thus, it includes documents initially created for the HMO's **other** business purposes that are then used directly to administer its HUSKY program. An example would be documents about a restrictive practice designed to discourage requests for prior authorization which was actually developed for a program other than HUSKY but which is now used **both** for that other program and HUSKY.
- Limit the documents subject to disclosure to specific areas of the HMOs' performance of their state contracts that are specifically determined (by an unidentified entity) to be a "governmental function," undercutting the current MCO contractual provisions acknowledging that the entire contract is about performing a governmental function.
- Declare that the obligation of disclosure "shall not, for any purpose, extend to documents related to other programs or functions of the managed care organization," thus making inaccessible relevant documents used in the HUSKY program which **also** are used under their Medicare or commercial lines of business. An example of this would be commercially-obtained Medical Necessity criteria used in all of an HMO's lines of business (note that these criteria used by Medicaid HMOs were recently ruled to be subject to full disclosure under federal Medicaid law, despite objection of a Medicaid HMO and its subcontractor, in Salazar v. District of Columbia, 2009 WL 281680 (D.D.C. Feb. 6, 2009)).
- Allow HUSKY HMOs to raise exemptions from disclosure directly, effectively barring public disclosure of any documents which the HMO contractor merely claims to be exempt from disclosure, even if DSS disagrees with the HMO's claim of exemption made to it or decides the document should otherwise be released because it is in the public interest to do so. Such a provision not only

removes from the state agency the authority to determine what documents are exempt from release, as has long been the position of the FOIC and the Attorney General, but it also undercuts the language in the current contracts.

- Allow HMOs to raise statutory exemptions from disclosure even beyond those set forth in the FOIA.

In sum, since the FOIC has ruled in favor of transparency and accountability under the FOIA for these large state contracts, the Governor and DSS have accepted this important open government ruling, and all three HUSKY HMOs have in fact signed contracts agreeing to this, there is no need to pass any legislation on this issue. As the move throughout the nation is to bring greater accountability in both health insurance and state contracting, this bill would actually take us in the wrong direction. I therefore urge you to protect transparency for these large state contracts and to vote "no" on SB 956.

Support for S.B. 957

Some seniors and individuals with disabilities who are or become over-income for the State Supplement (Aid to the Aged, Blind and Disabled) Program are being forced to live in a nursing home rather than remain in the community in a residential care home, a less restrictive setting. When the income of residents in residential care homes exceeds the 300% of SSI limit, due to cost of living increases in their pensions or Social Security benefits, even by a few dollars, their State Supplement benefits are terminated. Because the residential care home monthly private pay rate is well above their incomes, they find themselves without the means to pay for their care privately. Moreover, when they lose their State Supplement eligibility, they also lose their Medicaid coverage.

While the eligibility criteria for persons living in these homes includes a strict income cap, the eligibility for Medicaid in nursing homes does not, forcing these individuals into nursing homes to receive basic services. S.B. 957 would resolve this issue by allowing seniors slightly over-income to establish a special needs trust for this excess income, and from which trust the state will recover this amount after the death of the individual.

Thank you for the opportunity to speak with you today. I am happy to answer any questions you may have.